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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT JOHN BLANCHARD, JR., Defendant and Appellant.	A132144 (San Mateo County Super. Ct. No. SC069736A)

Appellant Robert John Blanchard, Jr., was convicted, pursuant to a plea agreement, of continuous sexual abuse of a child. On appeal, he contends (1) the trial court abused its discretion and violated appellant's due process rights when it imposed a sentence that exceeded the negotiated disposition in his plea agreement without permitting him to withdraw his plea; (2) the prosecutor violated the terms of appellant's plea agreement by arguing for a term in excess of the negotiated disposition; and (3) defense counsel's failure to move to withdraw appellant's plea constituted ineffective assistance of counsel. In an accompanying petition for writ of habeas corpus (habeas petition), he raises essentially the same issues raised on appeal. We shall affirm the judgment and, in a separate order, shall deny the habeas petition.

PROCEDURAL BACKGROUND

On November 3, 2009, appellant was charged by information with four counts of oral copulation or sexual penetration of a minor under the age of 10 (Pen. Code, § 288.7,

subd. (b)–counts 1 to 4)[1]; one count of continuous sexual abuse of a child (§ 288.5, subd. (a) –count 5); five counts of committing lewd acts on a child (§ 288, subd. (a)–counts 6 to 7 and 11 to 13); and three counts of annoying or molesting a minor (§ 647.6, subd. (a)(1) –counts 8 to 10).

On February 8, 2011, appellant pleaded no contest to count 5, continuous sexual abuse of a minor, and the remaining counts were dismissed with a *Harvey*[2] waiver.

On April 20, 2011, the trial court sentenced appellant to the upper term of 16 years in state prison.

On April 26, 2011, appellant filed a notice of appeal.[3]

DISCUSSION[4]

I. *Trial Court Background*

The written change of plea form, which appellant signed, provides in relevant part as follows:

"10. My attorney has explained that *the maximum penalty, including penalty assessments, which could be imposed as a result of my plea(s) of guilty or nolo contendere is 16 years state prison*; followed by 4 years parole . . . .

"11. I have not been induced to plead guilty or nolo contendere by any promise or representation of a lesser, sentence, probation, regard, immunity, or anything else except: *12 year state prison top (indicated)* & refer to probation; minimum of six years prison; PC 290 registration for life; [a]ny actual restitution. Remaining counts dismissed with a

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *People v. Harvey* (1979) 25 Cal.3d 754.

[3] The trial court denied appellant's request for a certificate of probable cause. Neither party claims that a certificate of probable cause is required in a case such as the present one in which "the grounds for [the defendant's] appeal arise from the trial court's failure to give effect to the terms of [the defendant's plea]." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1220 [no certificate of probable cause was necessary where defendant claimed court violated terms of plea agreement by awarding restitution beyond amount agreed to].)

[4] Because the facts underlying appellant's no contest plea are not necessary to the resolution of the issues raised on appeal, we will not recount them here.

Harvey waiver. PC 288.5 is a 'strike' for future purposes; sentence to be served at 85%.[¶] . . . [¶]

"13. I do understand that the matter of probation and sentence is to be determined solely by the Court and will not be decided until the report and recommendation by the Probation Department has been considered.

"The Court reserves the right to withdraw its consent to any sentence limitation agreement; and, in the event, I will be permitted to withdraw my plea(s) of guilty or nolo contendere and all charges will be reinstated." (Italics added.)

The trial court verbally reiterated these terms of the plea agreement in open court, confirming that appellant understood and accepted them before he pleaded no contest. The exchange between the court and appellant was, in relevant part, as follows:

"THE COURT: . . . [¶] Mr. Blanchard, did you read, understand and sign the plea form?

"THE DEFENDANT: Yes, ma'am. [¶] . . . [¶]

"THE COURT: Has anyone made any threat or promise in order to get you to give up those rights?

"THE DEFENDANT: No, ma'am.

"THE COURT: Are you entering this plea freely and voluntarily?

"THE DEFENDANT: Yes, ma'am. [¶] . . . [¶]

"THE COURT: *Do you understand that the maximum penalties and consequences for this conviction is 16 years in state prison* followed by four years of parole, $10,000 in fines, $10,000 in restitution fund fines with a $200 minimum, lifetime registration as a sex offender, genetic marker testing, and any actual restitution?

"THE DEFENDANT: *Yes, ma'am*.

"THE COURT: Has anyone threatened you in any way in order to get you to enter this plea?

"THE DEFENDANT: No, ma'am.

"THE COURT: Has anyone promised you anything other than the following—I should say indicated anything. Because of the nature of this offense, the Court cannot

make any promise, but I have indicated that the matter—upon being referred to the probation department at the time of sentencing, *I indicated that a sentence to state prison would not exceed 12 years which is the midterm for this offense, but I remain free to impose the aggravated term if there is something in the probation report that indicates that it is appropriate, and you would not be allowed to withdraw your plea*. I might also select a term that's less than 12 years. *Have any other indications been made in order to get you to enter this plea*?

"THE DEFENDANT: *No, ma'am.*

"THE COURT: Mr. Jackson [defense counsel], do you join in your client's waiver?

"MR. JACKSON: Yes, I do." (Italics added.)

The trial court found that appellant had made a free, knowing, and intelligent waiver of his constitutional rights; appellant pleaded no contest to count 5; and the court found him guilty of continuous sexual abuse of a minor. The court then granted the prosecutor's motion to dismiss the remaining counts with a *Harvey* waiver.

Subsequently, at the sentencing hearing, the prosecutor asked the court to sentence appellant to the maximum term of 16 years in state prison. Defense counsel acknowledged that the 12-year term was only an indicated sentence and the court noted that it had indicated, at the pretrial conference, "that it sounded as if the midterm of 12 years was an appropriate sentence, but that is by no means a promise." Defense counsel stated that he understood that, but asked that the court "consider giving him something less than the maximum sentence in this case."

The court then told appellant: "I was more disturbed in reading the probation report in your case than I have found myself in several years . . . ." It further stated: "The only thing that I can be certain [of] is for the period of time that you are incarcerated no other young girl will be victimized by you. As I have indicated, I am so bothered by everything that I have read in the probation report, the fact that there are multiple victims of this . . . ." The court ultimately sentenced appellant to the aggravated term of 16 years in state prison.

II. *Legal Analysis: Imposition of an Allegedly Excessive Sentence*

In both his direct appeal and his habeas petition, appellant contends the trial court abused its discretion and violated appellant's due process rights when it imposed a sentence that exceeded the negotiated disposition. He also contends the prosecutor violated the terms of the agreement by arguing for a 16-year sentence.

"Although a plea agreement does not divest the court of its inherent sentencing discretion, 'a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain. [Citation.] "A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound." [Citation.] Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly. [Citation.]' " (*People v. Segura* (2008) 44 Cal.4th 921, 931.) "As a general rule, if the result will be an *increased* punishment, the court must allow the defendant to withdraw the plea. ([§ 1192.5].)" (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385-1386.)

Here, appellant repeatedly asserts that the trial court improperly changed the terms of the plea agreement by sentencing him to the aggravated 16-year term, rather than the agreed-upon midterm of 12 years. He further asserts that the court thereby violated section 1192.5, which requires that if the court changes the terms of a plea agreement, it must permit the defendant to withdraw his plea.

Appellant misconstrues the terms of the plea agreement. Although it provided that the "indicated" sentence would be 12 years, it made clear that "the maximum penalty . . . which could be imposed as a result of [appellant's] plea(s) of guilty or nolo contendere" was "16 years state prison . . . ." Appellant expressed his understanding of and agreement to these terms**,** as well as to the term that the matter of sentence would "be determined solely by the Court and will not be decided until the report and recommendation by the Probation Department has been considered."

As the record makes plain, the 12-year indicated sentence was not a sentencing cap. Rather, as the trial court fully explained and the written plea agreement as a whole reflects, there was a sentencing range that included three possible sentences: the six-year

mitigated term, the 12-year middle term, and the 16-year aggravated term. Although the plea form reflected that the 12-year midterm would be the likely sentence, the plea form—and the court—also spelled out that the court "remain[ed] free to impose the aggravated term if there is something in the probation report that indicates that it is appropriate, and you would not be allowed to withdraw your plea." The court also noted that it "might also select a term that's less than 12 years." Appellant then affirmed that no "other indications [had] been made in order to get [him] to enter this plea[.]"

Thus, given the express terms of the plea agreement, the court's ultimate sentence of 16 years, based on what it had learned from the probation report, did not exceed the negotiated disposition. For that reason, there was no basis for the court to permit appellant to withdraw his plea. (Compare *People v. Akins*, *supra*, 128 Cal.App.4th at pp. 1385-1386, citing section 1192.5 [if court's sentence increases punishment beyond that contemplated by plea agreement, it must allow defendant to withdraw plea].)[5] Appellant has shown neither an abuse of discretion nor a due process violation in the court's imposition of a sentence of 16 years in state prison.[6]

Appellant further contends the prosecutor violated the terms of the plea agreement by arguing for a term in excess of the negotiated disposition. As we have already explained, the option of sentencing appellant to the aggravated 16-year term was expressly contemplated in the plea agreement. Moreover, nothing in the agreement

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[5] Appellant asserts that the trial court violated section 1192.5 by failing to inform appellant before he pleaded no contest that the court's approval of the plea was not binding; that it could, at the time set for the pronouncement of judgment, withdraw its approval; and that, in that case, appellant would be permitted to withdraw his plea if he desired to do so. (See § 1192.5.) Although the court may not have verbally informed appellant of these facts, the written plea agreement apprised appellant that the "Court reserves the right to withdraw its consent to any sentence limitation agreement; and, in the event, I will be permitted to withdraw my plea(s) of guilty or nolo contendere and all charges will be reinstated." (See § 1192.5.)

[6] We observe that appellant's agreement to plead no contest to one count of violating section 288.5, subdivision (a), with its maximum possible sentence of 16 years and the dismissal of all other charges, allowed him to avoid trial on, inter alia, four counts of violating section 288.7, subdivision(b), carrying mandatory 15-years-to-life terms.

precluded the prosecutor from arguing for the maximum possible term within the sentencing range.[7] Hence, the prosecutor did not violate the terms of the agreement when he argued at the sentencing hearing that the aggravated term was appropriate.

III. *Legal Analysis: Ineffective Assistance of Counsel*

In both his appeal and his habeas petition, appellant contends defense counsel's failure to enforce the plea agreement and/or move to withdraw the plea constituted ineffective assistance of counsel.

To prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*).) In addition, the defendant must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

With his habeas petition, appellant submitted two declarations: one by appellant and one by the attorney who represented him in the trial court. In appellant's declaration, he declared that, before he accepted the negotiated disposition, defense counsel told him that, "in the unlikely event that the judge later sentenced me to 16 years in state prison, I would be allowed to withdraw this plea." Upon entering his plea, appellant "understood the judge to say that my maximum sentence would be 12 years as was indicated in my written plea agreement." Appellant further declared that, just before his sentencing hearing, counsel said appellant would not be able to withdraw his plea based only on the court's sentencing him to a term longer than 12 years, "which upset me very much because he had previously led me to believe that withdrawing my plea would be easy if the judge failed to honor my plea agreement."

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[7] Appellant's reliance on *Santobello v. New York* (1971) 404 U.S. 257 is misplaced. There, unlike in the present case, the plea bargain included the condition that the prosecutor would make no sentence recommendation to the trial court. (*Id.* at p. 262.)

In defense counsel's declaration, he declared: "Prior to signing [the plea] agreement, I explained to [appellant] that his indicated maximum sentence of 12 years did not prevent the judge from imposing a longer term. Based upon these pre-plea discussions with petitioner, it was apparent to me that he would not have agreed to accept this deal without the agreed sentence cap." Counsel further declared that, at the sentencing hearing, he was surprised the court said it would probably impose a 16-year sentence and that he told appellant it was too late to withdraw his plea if the court imposed a 16-year sentence. Finally, counsel declared that he did not object to the subsequent imposition of a 16-year sentence "because I did not believe that there were valid grounds to do so. For the same reason, I did not object to the district attorney's recommendation for a 16 year sentence. Moreover, my failure to file a motion to withdraw petitioner's plea immediately after the imposition of sentence was not based upon any tactical or strategic considerations, but instead upon my belief that it was too late to do so at that time."

First, while appellant states in his declaration that defense counsel initially told him that he could withdraw his plea if he was sentenced to more than 12 years in prison, counsel's declaration contains no corresponding statement. (Cf. *People v. Duarte* (2000) 24 Cal.4th 603, 611 [As a general rule, a self-serving declaration lacks trustworthiness].)[8] Second, even had counsel made such a statement, it would not change the result. This is because the statement would have been contrary to the plain terms of the negotiated disposition, agreed to by appellant, which explicitly encompassed a possible sentencing range of six to sixteen years. (See *People v. Ribero* (1971) 4 Cal.3d 55, 61-62,

[8] Defense counsel's statement in his declaration, that "[b]ased upon these pre-plea discussions with petitioner, it was apparent to me that he would not have agreed to accept this deal without the agreed sentence cap," is ambiguous as to what he means by "sentence cap." Having just stated that he explained to appellant that the 12-year indicated sentence would not preclude the court from imposing a longer sentence, it would not make sense if counsel considered the 12-year midterm the "sentence cap." Moreover, as discussed in the text, *post*, regardless of the intended meaning of counsel's statement, the express terms of the plea agreement, accepted by both counsel and appellant, govern.

superseded by rule of court on another ground as stated in *In re Chavez* (2003) 30 Cal.4th 643, 655-656 [" '[P]urported misrepresentations of defense counsel that a specific sentence will be imposed are insufficient to vitiate a plea entered in reliance thereon' [citation]"].)

Appellant's assertion in his declaration that he "feel[s] misled into entering the plea by the judge, the district attorney, and my former attorney based upon the false promise that my maximum term of imprisonment would be 12 years" is belied by the record. The written plea agreement as a whole, together with the court's verbal explanations, explicitly contemplated the possibility of a 16-year sentence, which appellant acknowledged that he understood before the court accepted his plea. Indeed, after the court informed appellant that the indicated sentence was 12 years, but that it remained "free to impose the aggravated term if there is something in the probation report that indicates that it is appropriate, and you would not be allowed to withdraw your plea," it asked appellant: "Have any other indications been made in order to get you to enter this plea?" Appellant responded, "No, ma'am."

Defense counsel stated in his declaration that he did not object to imposition of the aggravated sentence or request that appellant be permitted to withdraw his plea because he believed it was too late to do so. Given our conclusion that appellant had no grounds for objecting or for withdrawing his plea, counsel's representation clearly was not ineffective.

Accordingly, the ineffective assistance of counsel claim, raised both in appellant's appeal and his habeas petition cannot succeed. (See *Strickland*, *supra*, 466 U.S. at p. 688.)

DISPOSITION

The judgment is affirmed.[9]

[9] In a separate order, we also deny appellant's petition for writ of habeas corpus.

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Kline, P.J.

We concur:

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Haerle, J.

_____
Lambden, J.

A132144, *People v. Robert John Blanchard, Jr.*